

March 3, 1999

RECEIVED
MAR - 3 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Personal
Communications
Industry
Association

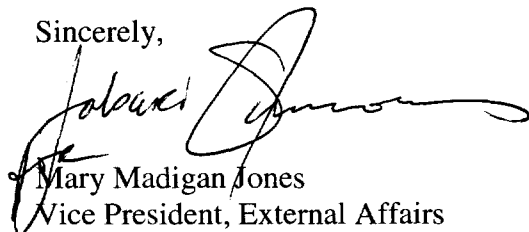
**Re: Ex Parte Presentation
CC Docket No. 94-54 (Wireless Resale)**

Dear Ms. Salas:

On Tuesday, March 2, 1999, the Personal Communications Industry Association (PCIA), represented by Mary McDermott and Mary Madigan Jones, met with Tom Sugrue, Jim Schlichting, John Cimko and Nancy Boocker of the Wireless Telecommunications Bureau regarding the above referenced proceeding. The points addressed in the meeting are set forth in the attached handout and are consistent with PCIA's previous filings in this docket.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter are being filed with your office. If you have any questions regarding this filing, please feel free to contact me.

Sincerely,


Mary Madigan Jones
Vice President, External Affairs

Attachment

cc: Tom Sugrue
Jim Schlichting
John Cimko
Nancy Boocker

No. of Copies rec'd
List ABCDE

041

RECEIVED

MAR - 3 1999

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

March 3, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Personal
Communications
Industry
Association


**Re: Ex Parte Presentation
CC Docket No. 94-54 (Wireless Resale)**

Dear Ms. Salas:

On March 3, 1999, the Personal Communications Industry Association (PCIA) hand delivered the attached letters to Mr. Ari Fitzgerald, Mr. Dan Connors, Mr. Paul Misener, Mr. Peter Tenhula, and Ms. Karen Gulick regarding the above referenced proceeding. The same attachment accompanied each of the five letters and a copy is also attached.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter are being filed with your office. If you have any questions regarding this filing, please feel free to contact me.

Sincerely,


Mary Madigan Jones
Vice President, External Affairs

Attachments

**THE COMMISSION DOES NOT HAVE LEGAL AUTHORITY TO EXTEND THE CMRS
RESALE RULE TO CPE IN BUNDLED SERVICE AND CPE PACKAGES**

On reconsideration of the *First Report and Order* in CC Docket No. 94-54,¹ several parties have asked the Commission to clarify that the CMRS resale rule does not extend to customer premises equipment ("CPE") in bundled packages of CMRS service and handsets. Solid legal and policy reasons dictate against such action.

**The Commission Does Not Possess Authority Under The Communications Act To Extend The
CMRS Resale Obligation To CPE**

The Commission's Title II Authority Does Not Permit Regulation of CMRS CPE

- ◆ The CMRS resale rule is premised on Sections 201(b) and 202(a) of the Communications Act,² which prohibit common carriers from engaging in unjust or unreasonable or otherwise discriminatory practices. As the Commission³ and the DC Circuit⁴ have concluded, CPE is not a common carrier service subject to regulation under Title II. As such, the Commission's Title II jurisdiction is generally limited to the service component of bundled CMRS offerings and does not extend to non-common carrier products or activities such as CPE.
- ◆ The Commission may regulate the rates, terms, and conditions applicable to carrier-provided CPE pursuant to its Title II jurisdiction in one narrow context: where such regulation is *necessary* to ensure the availability of Title II-regulated communications services at reasonable rates.⁵ This very limited exception is not applicable here.

¹ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 18455, at 18463, 18473 (1996) ("*CMRS Resale First Report and Order*").

² *CMRS Resale First Report and Order*, 11 FCC Rcd at 18473.

³ *Second Computer Inquiry*, 77 F.C.C.2d 384, 442-46 (1980).

⁴ *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, at 211 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) ("CCIA").

⁵ *Id.*

Titles I and III Do Not Permit Regulation Of CMRS CPE

- ◆ For similar reasons, the Commission does not have authority under its Title I ancillary jurisdiction to extend the CMRS resale rule to bundled CPE. Title I is not an independent source of regulatory authority; Title I confers only that power necessary to allow the Commission to carry out specific statutory responsibilities.⁶ The Commission's jurisdiction under Title I is restricted to that "reasonably ancillary to the effective performance of the Commission's various responsibilities."⁷
- ◆ In the *CCIA* case, the DC Circuit specifically determined that the Commission correctly exercised ancillary jurisdiction over CPE because such exercise was *necessary* to assure the availability of transmission services at reasonable rates.⁸ There is no evidence in the record indicating that a similar exercise of ancillary jurisdiction over CPE is necessary here. On the contrary, the Commission has recognized that the CMRS marketplace is "more competitive than most telecommunications markets."⁹
- ◆ Title III does not provide an independent grant of jurisdiction authorizing the Commission to regulate CPE. While Title III may be used in some instances to support the Commission's jurisdiction under other provisions of the Act, Title III does not do so here because no such other source of jurisdiction exists.
- ◆ Section 303(r) is not an open-ended grant of jurisdiction. This section has been interpreted as giving the Commission only ancillary authority to issue regulations to carry out directives codified elsewhere in the Act.¹⁰ CPE is not subject to regulation under any other provision of the Act and, therefore, may not be reached under Section 303(r).

⁶ *People of State of Cal. v. FCC*, 905 F.2d 1217, 1240-41 n.35 (9th Cir. 1990); *see also Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 759 (8th Cir. 1997) *rev'd in part, aff'd in part AT&T Corp. v. Iowa Utilities Bd.*, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099 and 97-1141, 199 WL 24568 (1999) (stating that Section 154(a) only provides the Commission with ancillary jurisdiction to carry out its primary directives set forth elsewhere in the Communications Act).

⁷ *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

⁸ *CCIA*, 693 F.2d. at 213.

⁹ *See Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, FCC 98-134, WT Docket No. 98-100, ¶ 8 (July 2, 1998).

¹⁰ *See People of the State of California v. F.C.C.*, 124 F.3d 934, 941 (8th Cir. 1997) (stating "subsections 154(i) and 304(r) merely provide the FCC with ancillary jurisdiction to promulgate additional regulations that might be required in order for the Commission to meet its principal obligations contained in other provisions of the statute."); *Iowa Utilities Bd. v. F.C.C.*, 120 F.3d at 795.

**The Market For CMRS CPE Is Competitive, Thus Making A Resale Obligation For CPE
Unnecessary**

- ◆ The market for CMRS CPE is robustly competitive. Facilities-based carriers and resellers are equally positioned to purchase CPE from manufacturers. Indeed, there is no showing that resellers have any difficulty purchasing CPE, combining it with transmission service obtained from CMRS providers, and creating their own bundled packages. Thus, even assuming that the Commission had jurisdiction to regulate CPE – which it does not – there is no basis for extending the resale rule to CMRS CPE. The market for CMRS CPE is robustly competitive.
 - ◆ An estimated 10.1 million digital handsets and an estimated 7.9 million analog handsets were sold in the U.S. during the first three quarters of 1998.¹¹
 - ◆ No company has an inordinate share of the CMRS CPE market. According to available studies, Nokia Inc., has the greatest market share in digital handsets, with 40.3 percent. Ericsson's estimated market share is 20.6 percent and Motorola's is an estimated 11.5 percent.¹² Data are not available for analog systems. Other mobile telephone equipment manufacturers include Audiovox, Mitsubishi Wireless, Samsung, NEC America, Inc., Sony, Panasonic Telecommunications Systems company, Philips, Qualcomm, Uniden America, and Siemens Wireless Terminals.
 - ◆ Industry analysts expect the major growth area in the next few years to be in dual- and tri-mode analog-digital phones. By 2002, tri-mode Code Division Multiple Access and Time Division Multiple Access phones could be running neck and neck, with 28.9 and 28.1 percent of the market respectively. Meanwhile, the market for code division multiple access ("CDMA") handsets in the U.S. is vigorously competitive with an estimated 12 to 14 manufacturers, while at least an equal number of single mode Global System for Mobile ("GSM") manufacturers are reportedly selling wireless phones.¹³
- ◆ Requiring CMRS providers to supply CPE to resellers is likely to injure the public interest by discouraging facilities-based operators from offering innovative CMRS packages.

* * * * *

¹¹ *Mobile Phone News*, Dec. 7, 1998.

¹² *Id.*

¹³ Elizabeth V. Mooney, Handset Market Demand Will Match Availability, *RadioComm. Report*, Feb 16, 1998.

RECEIVED

MAR - 3 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 3, 1999



Personal
Communications
Industry
Association

Mr. Paul Misener
Legal Advisor
Office of Commissioner Furchtgott-Roth
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

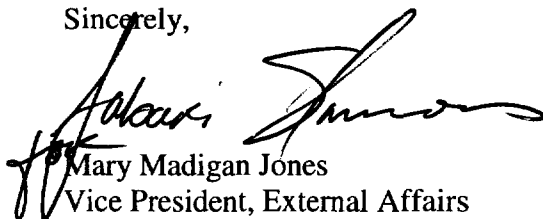
**Re: Ex Parte Presentation
CC Docket No. 94-54 (Wireless Resale)**

Dear Mr. Misener:

Yesterday, Mary McDermott and I met with Tom Sugrue, Jim Schlichting, John Cimko and Nancy Boocker of the Wireless Telecommunications Bureau regarding the above referenced proceeding. This meeting was a direct follow-up to our recent meeting on the same subject. Attached, for your information, is the *ex parte* material we provided to Mr. Sugrue and his staff. This material expands on the issue of whether the FCC has the legal basis for imposing a resale obligation on "bundled" CPE.

Please feel free to contact me or Mary McDermott if you have any questions.

Sincerely,



Mary Madigan Jones
Vice President, External Affairs

Attachment

RECEIVED

MAR - 3 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 3, 1999



Personal
Communications
Industry
Association

Ms. Karen Gulick
Legal Advisor
Office of Commissioner Tristani
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

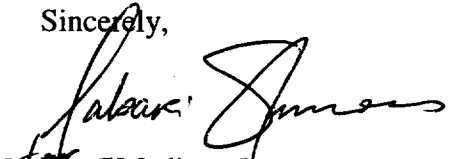
**Re: Ex Parte Presentation
CC Docket No. 94-54 (Wireless Resale)**

Dear Ms. Gulick:

Yesterday, Mary McDermott and I met with Tom Sugrue, Jim Schlichting, John Cimko and Nancy Boocker of the Wireless Telecommunications Bureau regarding the above referenced proceeding. This meeting was a direct follow-up to our recent meeting on the same subject. Attached, for your information, is the *ex parte* material we provided to Mr. Sugrue and his staff. This material expands on the issue of whether the FCC has the legal basis for imposing a resale obligation on "bundled" CPE.

Please feel free to contact me or Mary McDermott if you have any questions.

Sincerely,



Mary Madigan Jones
Vice President, External Affairs

Attachment

March 3, 1999

RECEIVED
MAR - 3 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY



Personal
Communications
Industry
Association

Mr. Ari Fitzgerald
Legal Advisor
Office of the Chairman
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

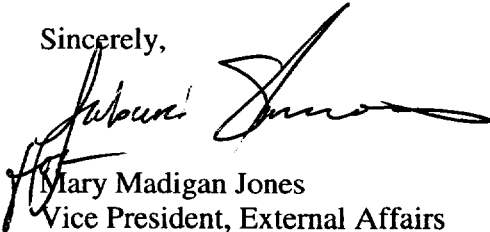
**Re: Ex Parte Presentation
CC Docket No. 94-54 (Wireless Resale)**

Dear Mr. Fitzgerald:

Yesterday, Mary McDermott and I met with Tom Sugrue, Jim Schlichting, John Cimko and Nancy Boocker of the Wireless Telecommunications Bureau regarding the above referenced proceeding. This meeting was a direct follow-up to our recent meeting on the same subject. Attached, for your information, is the *ex parte* material we provided to Mr. Sugrue and his staff. This material expands on the issue of whether the FCC has the legal basis for imposing a resale obligation on "bundled" CPE.

Please feel free to contact me or Mary McDermott if you have any questions.

Sincerely,


Mary Madigan Jones
Vice President, External Affairs

Attachment

RECEIVED
MAR - 3 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 3, 1999



Personal
Communications
Industry
Association

Mr. Peter Tenhula
Legal Advisor
Office of Commissioner Powell
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

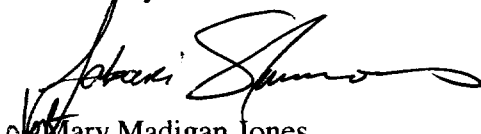
**Re: Ex Parte Presentation
CC Docket No. 94-54 (Wireless Resale)**

Dear Mr. Tenhula:

Yesterday, Mary McDermott and I met with Tom Sugrue, Jim Schlichting, John Cimko and Nancy Boocker of the Wireless Telecommunications Bureau regarding the above referenced proceeding. This meeting was a direct follow-up to our recent meeting on the same subject. Attached, for your information, is the *ex parte* material we provided to Mr. Sugrue and his staff. This material expands on the issue of whether the FCC has the legal basis for imposing a resale obligation on "bundled" CPE.

Please feel free to contact me or Mary McDermott if you have any questions.

Sincerely,


Mary Madigan Jones
Vice President, External Affairs

Attachment

March 3, 1999



Personal
Communications
Industry
Association

Mr. Dan Conners
Legal Advisor
Office of Commissioner Ness
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

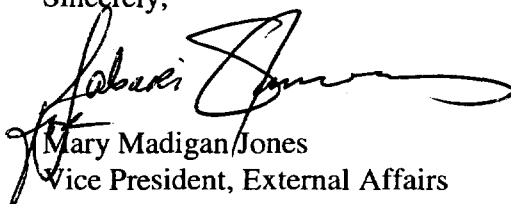
**Re: Ex Parte Presentation
CC Docket No. 94-54 (Wireless Resale)**

Dear Mr. Conners:

Yesterday, Mary McDermott and I met with Tom Sugrue, Jim Schlichting, John Cimko and Nancy Boocker of the Wireless Telecommunications Bureau regarding the above referenced proceeding. This meeting was a direct follow-up to our recent meeting on the same subject. Attached, for your information, is the *ex parte* material we provided to Mr. Sugrue and his staff. This material expands on the issue of whether the FCC has the legal basis for imposing a resale obligation on "bundled" CPE.

Please feel free to contact me or Mary McDermott if you have any questions.

Sincerely,



Mary Madigan Jones
Vice President, External Affairs

Attachment